a share of capital appreciation which would have been income but he would not after dissolution have had any interest in the land. That is, if the parties had forgotten about the agreement the appellant would not have been entitled to anything. Apart from the agreement he had no interest in the land. As it was, he received exactly what he was entitled to under the agreement, which indicates that the partnership was still in existence. I think the assessment was correct and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw*

In re A.B. LTD.

[A. C. J. (Whyatt C.J.) June 29, 1956]

[Singapore — District Court Appeal No. 1 of 1955]

Income Tax Ordinance, 1947, ss. 10 & 77 — Revenue derived from sale of burial plots — Whether "income in respect of gains or profits from a trade" — Income tax chargeable on income from trade ultra vires memorandum of association — Extent of deduction allowable.

Appeal — Question of mixed law and fact — Determination on a question of fact.

The respondents were estate owners carrying on the trade or business of rubber planting in different parts of Malaya. On a portion of one of their estates in Singapore all the rubber trees had been felled during the Japanese occupation and it was not considered profitable to use it again for rubber growing owing to the high cost of replanting and rather infertile character of the area. They decided to use part of their land in question as a cemetery, and accordingly they applied to the Government and obtained licence to use the land for Chinese burial purposes. They set aside one acre for use as a cemetery and built on it a temple, tiffin shed and caretaker's quarters and an access road at a total cost of approximately $30,000. In July 1948 they commenced disposing of the burial plots which varied in size. The only document which came into existence when they disposed of a burial plot was a receipt, signed by the secretary of the respondents, acknowledging that the respondents had received a stated sum "in payment of one lot of burial land . . . on our land at Jurong. The burial is subject to the Government's regulations and bye-laws for the time being in force." The burial ground grew steadily in popularity and by the end of 1954 the total area set aside for burial purposes had been increased to 12 acres.

The Comptroller of Income Tax having become aware of the respondents' activities in connection with this cemetery, wrote to them in August 1953 stating that he proposed to assess them "on the profits from the business of sale of burial plots", and in due course notices of assessment were served on the respondents claiming $3,406.50, $1,756 and $7,696.80 for the years 1951, 1952 and 1953 respectively. The respondents appealed to the Board of Review against the assessment on the ground that the disposal of these burial plots was a realisation of capital assets and consequently any revenues from this source were not assessable to income tax. The Comptroller, on the other hand, contended that the respondents were carrying on the trade or business of cemetery proprietors and any excess of income over expenditure was rightly assessed to income tax, as being "income in respect of gains or profits from a trade" within the meaning of section 10 of the Income Tax Ordinance, 1947. The Board found in favour of the respondents. The Comptroller appealed against that decision.

Held: (1) the disposal of a burial plot was not in law an outright sale of the land and consequently the respondents were not realising capital assets; (2) the revenue derived from selling burial plots was profit from a trade and consequently chargeable to income tax under section 10 of the Income Tax Ordinance, 1947; (3) if the activities of the respondents in relation to the disposal of burial plots were *ultra vires* their memorandum of association (which the Court did not think was the case) income tax was nevertheless chargeable on the profits of the trade; (4) no deduction in respect of the cost of land used as grave spaces can be made in the Colony unless and until the Income Tax Ordinance is amended on the lines of section 22 of the United Kingdom Finance Act, 1954.

It was also contended on behalf of the respondents that the finding of the Board that the respondents were not carrying on a trade was a pure finding of fact and therefore the Court was bound by that finding, even though it might have reached a different conclusion if it had been considering the matter *de novo*.

Held: an appellate Court may allow an appeal from a determination on a question of fact if it appears to the appellate Court that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. **Edwards v. Bairstow**(6) followed.

[**Editorial Note:** The Income Tax Ordinance, 1947 is now Chapter 166 of the Laws of the Colony of Singapore, Edition of 1955. Sections 10 and 77 are now sections 10 and 81 respectively.]

Cases referred to:—

(1) *Inland Revenue Commissioners v. Duke of Westminster* (1936) A.C. 1, at p. 19.

(2) *Portobello Town Council v. Sulley (Surveyor of Taxes)* 2 T.C. 647.

(3) *Paddington Burial Board v. Commissioners of Inland Revenue* 2 T.C. 46.

(4) *Edinburgh Southern Cemetery Co. v. Kinmont (Surveyor of Taxes)* 2 T.C. 516.

(5) *London Cemetery Co. v. Barnes* (1917) 2 2 K.B. 496.

(6) *Edwards (Inspector of Taxes) v. Bairstow* (1955) 3 All E.R. 48; (1956) A.C. 14; (1955) 3 W.L.R. 410; 36 T.C. 207.

(7) *Mann v. Nash* (1932) 1 K.B. 752; 16 T.C. 523.

(8) *Southern v. A.B. Ltd.* (1933) 1 K.B. 713; 18 T.C. 59.

(9) *British Insulated and Helsby Cables v. Atherton* (1926) A.C. 205, at p. 213; 10 T.C. 155.

INCOME TAX APPEAL.

G. S. Hill (Crown Counsel) for the appellant.

C. H. Withers-Payne for the respondents.

Whyatt C.J. : — This is an appeal from a decision of the Board of Review which decided that the respondents were not liable to pay income tax in respect of receipts from the disposal of Chinese burial spaces on their land in Singapore.

The respondents were incorporated in 1934 and until the Japanese war carried on the trade or business of rubber planting in different parts of Malaya. After the liberation they resumed the business of rubber planting on their various estates with the exception of a portion of an estate on Singapore Island, about 270 acres in extent, on which all the rubber trees had been felled during the Japanese occupation. Owing to the high cost of replanting and the rather infertile character of this particular area it was not considered profitable to use it again for rubber growing. The directors of the respondents considered various alternative means of disposing of this land and eventually decided, in the words of the respondents' petition to the Board of Review, "to use part of it as a cemetery".

Accordingly the respondents applied to the Government, pursuant to the provisions of section 1 of the Burials Ordinance, for permission to use the land for burial purposes and on the 24th June 1947, a licence was issued to the respondents under the hand of the Acting Colonial Secretary of the Colony, permitting them to use the land as a public burial ground for the burial of Chinese. The respondents, thereupon, set aside one acre for use as a cemetery and built on it a temple, a tiffin shed and caretaker's quarters and an access road at a total cost of approximately $30,000; they also appointed one of their staff as caretaker at a small wage with free quarters whose duties were to look after the buildings and the cemetery area and to show the site to prospective purchasers of burial plots. In July 1948 the respondents commenced disposing of the burial plots which varied in size from 50 to 200 square feet. The burial ground grew steadily in popularity and in 1952 the respondents added to the original site a further 9 acres making 10 acres in all, and by the end of 1954, the total area had been still further increased to 12 acres.

In the meantime the Comptroller of Income Tax, having become aware of the respondents' activities in connexion with this cemetery, wrote to the respondents in August 1953 stating that he proposed to assess them "on the profits from the business of sale of burial plots", and in due course notices of assessment were served on the respondents claiming $3,406.50, $1,756 and $7,696.80 for the years 1951, 1952 and 1953 respectively. The respondents appealed to the Board of Review against the assessments on the ground that the disposal of these burial plots was a realisation of capital assets and consequently any revenues from this source were not assessable to income tax. The Comptroller, on the other hand, contended that the respondents were carrying on the trade or business of cemetery proprietors and any excess of income over expenditure was rightly assessed to income tax, as being "income in respect of gains or profits from a trade" within the meaning of section 10 of the Income Tax Ordinance 1947. The Board found in favour of the respondents and the Comptroller appeals from their decision.

The Ordinance provides two methods of appeal. The first, under section 77, is an appeal on any question of law or of mixed law and fact, and the procedure governing the appeal is the same as in appeals from a District Court to the High Court in a civil matter; under that procedure, an appeal to the High Court is by way of rehearing and appellate Court has power to draw inferences of fact and to make any order which ought to have been made and such further order as the case requires. The second method, under section 78, is by way of case stated and is on a question of law only. The present appeal is under section 77.

The first question to be considered is the nature of the transaction which is entered into by the respondents when they make available a burial plot to a member of the public. If there is an outright sale of the burial plot so as to transfer the title in the land itself from the respondents to the buyer, then the transaction may properly be said to be a realisation of an asset; if, on the other hand, it is a mere licence to use the land for burial purposes, the ownership of the land itself remaining unchanged, it would not be a correct use of language, in my view, to say that the respondents were realising an asset. The only document which comes into existence when the respondents dispose of a burial plot is a receipt, signed by the secretary of the respondent company, acknowledging that the respondents have received a stated sum "in payment of one lot of burial land ..... on our land at Jurong. The burial is subject to the Government's regulations and bye-laws for the time being in force". This documentary evidence was supplemented to some extent at the hearing before the Board of Review where it was stated on behalf of the respondents that the caretaker received payment for the plots on behalf of his employers, the amounts varying according to their size and situation, and in consideration of this payment, the respondents granted perpetual burial rights over the plots; as the representative of the respondents put it, the respondents only sold rights over the plots. A similar, if not identical, situation frequently arises in England, both at common law and under various statutes, when exclusive rights of burial are granted; in such cases, there is no transfer of any freehold or leasehold interest in the land but the creation of a licence or at most an easement over the land. Apparently the Board of Review also took the view that the sale of these burial rights was no more than the grant of a licence since they refer, in their

decision, to "income derived from licensing" and state in terms that the plots were not sold.

Despite this, however, they go on to say that they feel the sale of burial rights is a sale of a capital asset because the respondents are deprived of the use of the land for as long as the Government permits the land to be used as a cemetery. In other words, after finding that in law the transaction is a licence and not a sale, the Board proceed to ignore the distinction and deal with the matter on the basis that it is, in substance, a sale of a capital asset. This method of approach in revenue cases was severely condemned by Lord Tomlin in the case of the *Inland Revenue Commissioners v. Duke of Westminster*[1] in the following words:—

> "It is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called 'the substance of the matter' . . . . This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law.'"

It is true that the principle enunciated by Lord Tomlin worked in favour of the taxpayer in that particular case but it must, in my opinion, apply equally when it works in favour of the Crown. The only matter to be considered, therefore, in this case, is the legal nature of the transaction. The respondent sought to argue that it was in law an agreement for the sale of the whole of the respondents' legal estate in the land and that the purchaser could, if he wished, bring an action for specific performance requiring the respondents to execute a conveyance of the property. The short answer to this argument is that it is contrary to the evidence given by the respondents themselves at the hearing before the Board of Review and to the terms of the receipt which speaks of a payment for "one lot of burial land ..... on our land". It is clear that the respondents neither agree to nor even contemplate an outright transfer of their title to the land when disposing of burial rights; they merely grant licences to members of the public to use the plots for burial purposes. It follows, therefore, that whatever may be thought of the Board's view as to the substance of the transaction, it is not in law an outright sale of the land and consequently the respondents are not realising capital assets in this case.

Having reached this conclusion regarding the legal nature of the transaction, the next question which poses itself may be formulated thus: if the respondents are not realising their capital assets, what is the correct description of their activities in connexion with the disposal of burial plots to members of the public? To this question, the Comptroller suggests there is a simple answer, namely, that they are carrying on the trade or business of cemetery proprietors. The law reports contain a number of cases concerning the liability to income tax of companies and local authorities which engage in this particular form of commercial activity. Such cases as *Portobello Town Council v. Sulley (Surveyor of Taxes*[2]*)*, *Paddington Burial Board v. Commissioners of Inland Revenue*[3], *Edinburgh Southern Cemetery Co. v. Kinmont (Surveyor of Taxes*[4]*)* and *London Cemetery Co. v. Barnes*[5], show quite plainly that although questions may arise as to the deductions which are allowable in arriving at profits or as to the effect of applying profits in aid of the rates and matters of that kind, there is no doubt at all that moneys received for the sale of rights of burial in cemeteries, either in perpetuity or for a limited period, are trade receipts and as such are assessable, subject to proper allowances, to income tax under the Income Tax Acts. The matter is summarised in *Simon's* Income Tax, Vol. II at page 101, where it is stated that "if revenue is derived from selling grave spaces in a cemetery, the resulting profit is assessable under Case I of Schedule D (which relates to profits derived from trade), whether or not the seller undertakes to maintain the graves."

The Board of Review, however, held that the respondents were not carrying on a trade or business because, as they put it, "the land was acquired for the purpose of producing income as a rubber estate. After some years a portion of it was found to be unsuitable for this purpose and (for all practical purposes) the said portion was sold though this is not an accurate description of the transaction". In other words the Board's conclusion that the respondents are not carrying on a trade or business is founded on the premise that they are realising their assets but as that premise is, as I have already shown, a false premise, it follows that the conclusion is likewise fallacious. It is, in my opinion, plain, on the facts of this case, that the respondents while retaining the ownership of the land are receiving revenue from selling grave spaces in this cemetery and therefore this case falls directly within the statement in *Simon's* Income Tax to which I have referred and which I accept as being authoritative and accurate. It follows, therefore, in my judgment that the receipts from the sale of burial plots by the respondents are income in respect of profits from a trade and consequently chargeable to income tax under section 10 of the Income Tax Ordinance 1947.

It was, however, strenuously contended on behalf of the respondents at the hearing of this appeal that the finding of the Board that the respondents were not carrying on a trade was a pure finding of fact and therefore this Court was bound by that finding, even

though it might have reached a different conclusion if it had been considering the matter *de novo*. In my opinion this argument states the position too widely. It is, of course, true that there is no appeal from the Board of Review on a question of fact but numerous authorities show that an appellate Court may allow an appeal from a determination on a question of fact if it appears to the appellate Court that a misconception of law has been responsible for the determination. All these authorities are reviewed in a very recent case, *Edwards (Inspector of Taxes) v. Bairstow*[6] in which Lord Radcliffe delivered, as usual, if I may respectfully say so, a brilliantly clear judgment in which he said :—

> "It may be the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances . . . the court must intervene. I do not think that it matters whether the state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three."

I too, with respect, prefer the third test and applying it to the primary facts found in the present case, I am of the opinion there is only one true reasonable conclusion and that is that the respondents are carrying on the trade of selling grave spaces in this cemetery.

There is, however, an additional reason for rejecting this particular argument of the respondent. The present appeal, being under section 77, permits an appeal not only on a question of law (as was the case in *Edwards v. Bairstow*[6]) but on a question of mixed law and fact as well. According to *Simon's* Income Tax, Vol. II at page 21, the question "whether or not a trade is being carried on, is a mixed question of fact on the one hand and of law on the other." The Board of Review also in their grounds of decision, refer to the question whether the respondents are carrying on a trade as "a question of mixed law and fact". It follows, therefore, that if this matter is treated as a question of mixed law and fact, it is open to this Court to find that the respondents were carrying on a trade notwithstanding the Board of Review reached a contrary conclusion.

Before leaving this topic, I desire to refer briefly to an argument of an entirely different kind advanced by the respondents on this aspect of the case. It was contended that if the respondents were carrying on a trade as the Comptroller maintained, it would be *ultra vires* the objects set out in their memorandum of association and therefore the profits would not be assessable to income tax. This argument was not apparently advanced at the hearing before the Board of Review and in my opinion, it has no validity. In the first place, I consider that paragraph (r) of the memorandum of association (which provides that the respondents may grant licences, easements and deal in any other manner with their property) is wide enough to cover their present activities, but even if that were not so and their activities in this connexion were *ultra vires*, the profits resulting from them would not on that account escape taxation. Ever since the decision in *Mann v. Nash*[7] it has been settled law that income tax is chargeable on the profits of a trade, notwithstanding that the trade is illegal. This principle was applied to a limited company in the case of *Southern v. A.B. Ltd.*[8] where the company was engaged in the illegal, and therefore *ultra vires*, trade of ready-money betting and consequently I am of the opinion that if the present activities of the respondents are likewise *ultra vires* (which I do not think they are) the principle would be wide enough to cover the profits resulting from this trade.

The only remaining question to be determined is the extent to which deductions may be allowed against the revenues received from the disposal of these burial rights. The Comptroller concedes that the respondents may deduct the wages of the caretaker and the cost of the upkeep of the road and the buildings and any similar items of expenditure necessarily incurred in earning the revenues but maintains that no deductions should be made in respect of (a) the capital cost of the road, the temple, the tiffin shed and the caretaker's quarters and (b) the capital cost of the land itself.

As regards (a), although this point was not argued by either party at the hearing before the Board of Review, the Board nevertheless took it upon themselves to make a finding that "a proportionate cost", as they expressed it, of the construction of the buildings and the road should be allowed as a deduction, but in doing so, they gave no indication as to how a proportionate cost could be arrived at in a growing business such as this which has increased the area of its activities from one acre in 1948 to ten acres in 1952 and twelve acres in 1954 and may well increase it still further in the future. However, the problem of assessing "a proportionate cost", does not arise because the expenditure on the road and the buildings was, in my opinion, clearly capital expenditure, having been undertaken, (to quote Lord Cave's well-known words in *British Insulated and Helsby Cables v. Atherton*[9]) "not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade," and as such it is not deductible, either wholly or in part, when computing profits.

As regards (b), the Comptroller conceded there was a certain equity in the respondents' claim to deduct

the capital cost of the land from the receipts obtained from the sale of perpetual burial rights but contended that, on the law as it stands, there is no authority to make such a deduction. I do not doubt that it would be in accordance with ordinary commercial practice to apply part of the receipts from the sale of grave spaces towards redeeming the cost of the land because when the cemetery is full, the source of profit will then be exhausted; or, to put the matter another way, a cemetery is analogous to a wasting capital asset. The principle has, however, long been established that where the income of a taxpayer is derived from the exhaustion of a wasting capital asset, no deduction can be allowed for the cost of that asset in the absence of express provisions to the contrary. Such provisions exist in relation to mines and mineral deposits of a wasting nature in section 14(1)(h) of the Income Tax Ordinance but there are no similar provisions relating to cemeteries. This was also the position in the United Kingdom until 1954 when the Finance Act, passed in that year, provided specifically in section 22, that in computing the profits of a trade which consists in the carrying on of a cemetery, a deduction should be allowed in respect of any capital expenditure incurred in providing the land in the cemetery. This amendment to the law was made, as appears from the note in *Halsbury's* Statutes (Vol. 34 page 307), in order to nullify the effect of the decision in *Edinburgh Southern Cemetery Co. v. Kinmont*[4] where it was decided that the cost of land used for grave spaces could not be deducted from the proceeds of the sales of burial rights. Although the assessment in that case was made under Schedule A, r. 3 of III (which is not reproduced in the Colony Income Tax Ordinance), the question involved was the same as in the present case, namely, the method of ascertaining the profits of a cemetery company, and therefore it follows, by parity of reasoning, that no deduction in respect of the cost of land used as grave spaces can be made in the Colony unless and until the Income Tax Ordinance is amended on the lines of section 22 of the United Kingdom Finance Act 1954.

In the result the appeal is allowed with costs and the assessments of the Comptroller are restored.

Appeal allowed.

Solicitors: *Drew & Napier.*

HUMPHREY v. HUMPHREY

[A. Cr. J. (Tan Ah Tah J.) March 21, 1956]

[Singapore — District Court Appeal No. 18 of 1955]

Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 47) — Maintenance order by High Court in England and registered in the Criminal District Court — Enforcement of order — Procedure.

This was an appeal against the order of the First Criminal District Court whereby the appellant who is the husband of the respondent was ordered to pay the Official Assignee, Singapore, the sum of $150 per month towards certain arrears of maintenance due to the respondent. A maintenance order had been made against the appellant by the High Court in England and had been transmitted to the First Criminal District Court for registration under section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance. The maintenance order was duly registered in the First Criminal District Court. The next step that was taken was the issue of a summons under the Married Women and Children (Maintenance) Ordinance, 1949 to the appellant calling upon him to show cause why he should not be sentenced to imprisonment for neglecting to pay the arrears of maintenance to the respondent. At the hearing of this summons, the learned District Judge made the order against which this appeal was brought. The grounds of appeal raised were: (a) that the order made by the learned District Judge was a nullity and was made without jurisdiction in that section 3 of the Married Women and Children (Maintenance) Ordinance authorised only the enforcement of orders made under the said Ordinance and not of orders registered under section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance; (b) that the learned District Judge was wrong in law in holding that he had no power to rescind or vary the order.

Held: (1) by virtue of section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance the District Court has jurisdiction to enforce an order which has been registered under the provisions of the Ordinance in the same manner as it can enforce a maintenance order which had originally been obtained in it; (2) the registration of the order is an administrative act and the party against whom it is made has no right to be heard to show cause against the registration nor does the fact that on registration the order becomes an order of the District Court itself give him a right to appeal either from the order itself or from the registration of it; (3) the first step that should have been taken by the learned District Judge after registration of the order was to make a direction regarding the payment of the arrears of maintenance as provided for by rule 7 of the Maintenance Orders (Facilities for Enforcement) Rules, 1932, and therefore as this had not been done in this case, the learned District Judge had acted prematurely in issuing the summons under section 3 of the Married Women and Children (Maintenance) Ordinance; (4) in hearing the summons issued under section 3 of the Married Women and Children (Maintenance) Ordinance the learned District Judge had no discretion to order the payment of the arrears of maintenance by instalments.

[**Editorial Note:** The Reciprocal Enforcement of Maintenance Orders Ordinance, and the Married Women and Children (Maintenance) Ordinance, 1949 are now Chapters 19 and 44 respectively of the Laws of the Colony of Singapore, Edition of 1955.]

Cases referred to:—

(1) *Pilcher v. Pilcher* (1955) 3 W.L.R. 231.

(2) *Woosey v. Woosey* (1938) M.L.J. 100.

DISTRICT COURT APPEAL.

P. F. X. Leonard for the appellant.